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September 24, 2003

RECEIVED

SEP 24 2003

Federal Communications Commission
Office of Secretary

Marlene Dortch, Secretary,
Federal Communications Commission
445 12th Street SW
Room TWB-204
Washington, DC 20554

Re Ex Parte Notification WC Docket 03-167, Application By SBC Communications Inc For Authorization Under Section 271 of The Communications Act to Provide In-Region, Inter LATA Service in the States of Illinois, Ohio, Indiana and Wisconsin

Dear Ms Dortch

Pursuant to Section 1.1206 of the Commission's Rules, Mpower Communications Corp. ("Mpower") submits this ex parte in the above-captioned proceeding in response to the ex parte filed by SBC Communications on September 22, 2003.¹

The sole issue between SBC and Mpower is whether or not SBC properly billed Mpower for trip charges associated with approximately 14,000 trouble tickets. SBC's response to this inquiry is, in effect, "Yes, but we just can't prove it. The data sample that we agreed to examine to determine whether or not we have properly billed Mpower is not dispositive because it contains 50 tickets for which we improperly billed Mpower." This is typical SBC "reasoning." The bottom line is that the sample data that SBC agreed to examine to resolve this dispute contained bills improperly rendered by SBC and that demonstrate a 93% error rate. SBC contends now, though, that the sample it agreed to examine was "improper" and that a "majority of the charges disputed by Mpower should be sustained."² Not only is this statement an outright misrepresentation, but it also effectively demonstrates just how flawed SBC's billing system is.

¹ See Ex Parte Letter from Geoffrey Klineberg, Kellogg, Huber, Hansen et al. to Marlene H. Dortch, FCC at Appendix A (Sept. 22, 2003) (hereinafter "September 22 Ex Parte Response").

See September 22 Ex Parte Response, Attachment A at 2

1st A B C D E

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In its September 22 Ex Parte Response SBC defends its flawed billing system by arguing that the data sample that it had previously agreed would be most representative of the entire dispute with Mpower— the 75 randomly picked tickets from the 684 tickets opened in June and July 2002—is now “flawed” and not a “proper, representative sample of SBC’s performance” because the sample set of tickets for June and July 2002 erroneously contained bills that predated the April 7, 2002 settlement of between SBC and Mpower, despite the fact that SBC had spent weeks examining the tickets issued in June and July 2002.³ The Commission should see through the smoke that SBC is creating in an attempt to obfuscate this very simple issue.

As an initial matter, SBC complains that issues related to SBC’s improper billing of Mpower for trip charges, as discussed in detail by Mpower in its September 16, 2003 ex parte, are “not appropriate for resolution in a 271 proceeding and should be handled on a business-to-business basis.” Although it is understandable that SBC would prefer not to have information regarding its poor performance put on the public record, SBC’s assertion that this forum is not the appropriate forum for the Commission to consider wholesale billing issues experienced by Mpower in the state of Illinois is clearly mistaken. The discussion of wholesale billing accuracy, which comprises the entire sum and substance of Mpower’s September 16 ex parte filing, is clearly a proper matter for consideration by the Commission in the context of the instant application. As Mpower noted in its Sept. 16 filing, in the *Verizon Pennsylvania Order* the Commission concluded that nondiscriminatory access to network elements under checklist item 2 includes the requirement that a BOC demonstrate that it can produce readable, auditable and accurate wholesale bills.⁴ SBC has not made the requisite showing. While certainly it is true that the myriad problems created by SBC’s deficient wholesale systems require resolution pursuant to business-to-business negotiations, the occurrence of such negotiations certainly do not preclude Mpower from raising here the fundamental and endemic billing problems necessitating those negotiations in the first place.

In fact, Mpower has been attempting to resolve this dispute with SBC since April 2002, for over 14 months, before SBC saw fit to engage in any good-faith carrier-to-carrier negotiations with Mpower. SBC’s stock response to disputes filed by Mpower relating to the disputed trip charges was to “sustain” the charges. SBC sustained the charges even though, as would later be revealed, SBC could not even find the associated circuit IDs or any other information that would indicate that the disputed ticket either belonged to Mpower or that the trouble was on Mpower’s network. SBC as much as admitted this in its September 22 Ex Parte Response. Nonetheless, SBC routinely attempted to sustain the charges disputed by Mpower. Only on the eve of the filing of this application did Mpower’s trip charge dispute with SBC take

³ See Exhibit 1, July 8, 2003 email from Larry Cooper to Scott Sarem, wherein Mr. Cooper states that “Our folk continue to analyze the data provided by Mpower to understand what gaps may still exist.”

⁴ See *Verizon Pennsylvania Order*, Memorandum Opinion and Order, 16 FCC Rcd 17419, ¶¶22-23 (2001) (“*Verizon Pennsylvania Order*”).

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on any degree of urgency for SBC. Nonetheless, while the parties have been working together to resolve this dispute since June 2003, SBC's September 22 Ex Parte Response appears to fundamentally misrepresent the facts surrounding this dispute in a manner that is disingenuous, and which belies the evidence that Mpower provides herein.

SBC states that in June 2003 Mpower and SBC agreed to sample approximately 30 to 40 tickets using a previously agreed upon format, but that Mpower, rather than reviewing those tickets, "provided a second (different) sample to SBC consisting of approximately 20 circuits that did not match the sample of 32 that SBC had submitted."⁵ However, SBC omits a crucial piece of the story. Mpower attempted to investigate the sample provided by SBC, but found that of the 30 tickets provided by SBC, 5 them were duplicates and several more of the samples did not contain enough identifying information to allow Mpower to investigate them. Nonetheless, Mpower assessed the tickets provided by SBC and found that SBC had inappropriately assessed trip charges 69% of the time. In fact, Scott Sarem, Vice President, Mpower provided this information to SBC Vice President Larry Cooper in a June 16, 2003 email to Mr. Cooper which is attached hereto as Exhibit 1.⁶ SBC responded to Mpower's investigation by arguing that Mpower had not provided SBC with adequate information to investigate the disputes.⁷ Nonetheless, pending the investigation of the disputes, SBC insisted that Mpower pay for trip charges that SBC could not even find in its billing system, much less, substantiate the propriety thereof.

To counter the initial sample Mpower provided, SBC conducted its own "random sample" of tickets. This sample apparently was not randomly generated, and appeared to be intended to substantiate SBC's characterization of the trip charge dispute with Mpower. However, Mpower conducted its own audit of the SBC-chosen tickets, and still found that SBC had incorrectly billed Mpower on 60% of the tickets. Even when SBC filtered the sample in an apparent effort to pre-determine a positive outcome, Mpower substantiated that SBC was wrong 60% of the time.⁸ SBC and Mpower didn't accept the results of the other's analyses.

Given that SBC and Mpower could not agree on the results of two prior investigations, SBC and Mpower agreed to a third investigation that would examine a statistically significant number of randomly picked tickets that were issued during a relevant time period. Further, the parties agreed to "ground rules" that would govern the results.⁹ SBC and Mpower further agreed that to the extent that they could not agree upon the results of the

⁵ September 22 Ex Parte Response, Attachment A at 1.

⁶ See Exhibit 2, July 16, 2003 email from Scott Sarem, Mpower to Larry Cooper, VP SBC.

⁷ Ironically, Mpower provided SBC the requested information using the same invoice that Mpower had received from SBC. That SBC could not find the information on its own invoice clearly demonstrates that SBC's bills are not "auditable" as required by Section 271.

⁸ See Exhibit 3, July 15, 2003 email from Scott Sarem, SBC to Jennifer Jones, SBC.

⁹ See Exhibit 4 - "Ground Rules" email, *see also* Mpower Sept. 16 ex parte.

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investigation, the amounts associated with the disputed tickets would be resolved through the dispute resolution portion of the interconnection contract.¹⁰ Accordingly, Scott Sarem of Mpower and Larry Cooper of SBC met on and off for over a week in a effort to identify the total number of trouble tickets in dispute and the proper months to review to gain a statistically significant and accurate characterization of the issue at hand.¹¹ At Larry Cooper's suggestion, Mpower agreed to utilize the results of a random sample from a pool of 684 trouble tickets from the months of June and July of 2002. Both Mr. Cooper and Mr. Sarem agreed that these two months would accurately reflect the trip charge billing from April 2002 through August of 2003, and the results of this audit would be applied to the rest of the disputes. This was a material term of the "ground rules," and was suggested by SBC. Mpower subsequently agreed to the months in question and agreed to provide 75 randomly selected numbers to be applied to the list of 684 tickets compiled by SBC.¹² The results of this audit demonstrated a 94% SBC error rate.

In its September 22 Ex Parte Response, SBC contends, with no further explanation, that it should not be held responsible for the results of the random sample because among the 75 tickets that SBC agreed to include in the audit, 50 of them "were related to trip charges with work dates that predated terms of the parties' confidential settlement agreement (i.e. they occurred prior to April 7, 2002)." But as evidenced by Mr. Cooper's July 8, 2003 email to Scott Sarem, (attached hereto as Exhibit 1) SBC personnel had, prior to the beginning of the investigation and of the 75 sample tickets, conducted a thorough review of the underlying data. SBC's admission that it agreed to include the June and July 2002 data, which included back billed charges going back almost *two years* highlights precisely what is wrong with SBC's billing system. That is, SBC's billing system is so messed up that it precludes SBC, even in the context of the audit of a limited data sample, from ensuring that it is providing accurate data, and allows SBC to back bill Mpower for ancient charges. At bottom, SBC's inability to render

¹⁰ *Id.*

¹¹ The reason that Larry Cooper and Scott Sarem agreed to the ground rules was to clear up any confusion surrounding the results from the two earlier samples. In the earlier samples, there was no independent manner to verify whether the tickets were selected randomly and there was no time requirement to limit the number of tickets to a statistically significant time period. In other words, the results of approximately 30 to 50 tickets could not be applied to 14,000 tickets in any accurate manner. Additionally, both companies continued to disagree with the results of the samples. Both parties agreed that rather than going back and forth on a flawed sample, it would be more productive to agree in advance upon a methodology, sample size, and sample period.

¹² See Exhibit 4.

¹³ SBC Ex Parte Response, 2. SBC agreed to not bill Mpower for anything prior to April 7, 2002. SBC created new Billing Account Numbers for Mpower to ensure that it would not misbill Mpower for anything prior to April 7, 2002. However, in the time period in question, SBC billed Mpower for invalid trip charges from as far back as November 2000. In other words, SBC misbilled Mpower in violation of prior agreements over 18 months after the billable event occurred. The random sample showed that SBC attempted to back-bill Mpower for a significant amount of invalid trouble tickets that occurred prior to April 7, 2003. It was not that SBC made an innocent mistake of mis-billing events from March 2002 after April 2002. Rather, SBC intentionally billed Mpower for events that happened in many cases one year prior to the agreement.

KELLEY DRYE & WARREN LLP

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accurate bills, highlighted by this incident, is the reason SBC and Mpower have a \$1.2 million dispute outstanding pertaining to incorrectly billed trip charges.

SBC has incorrectly billed Mpower for trip charges on numerous occasions as a result of a billing system that prevents SBC from rendering accurate wholesale bills. SBC's only defense, even in the face of uncontroverted evidence of its inaccurate billing, is to argue that it should not be held responsible for the agreement it struck with Mpower because it did not know the extent of the problems with its billing system and practices. At bottom, SBC's September 22 Ex Parte Response is nothing more than an attempt to lead the Commission to believe that the billing issues it has with Mpower arose from nothing more than a one-time confluence of honest mistakes and bad timing. Mpower submits that the issue is much more serious and remains unresolved. SBC now claims that it has "procedures in place" to ensure proper trouble-ticket coding" to allow CLECs to challenge the disposition of trouble tickets before they are billed. This system was made available to Mpower only in June of 2003, and accordingly, Mpower does not yet have enough experience with it to determine if it is effective.

Respectfully submitted,



Ross A. Buntrock

cc

Pamela Arluk
Douglas Galbi
Deena Shetler
Jennifer McKee
Irshad Abdal-Haqq
Layla Scrafi-Najar (DOJ)

EXHIBIT 1

Buntrock, Ross A.

From: Sarem, Scott [ssarem@mpowercom.com]
Sent: Tuesday, September 23, 2003 1:36 PM
To: Buntrock, Ross A
Cc: Sarem, Scott
Subject: FW: Billing Disputes

-----Original Message-----

From: COOPER, LARRY B (SBC-MSI) [mailto:lc7178@sbc.com]
Sent: Tuesday, July 08, 2003 9:17 AM
To: 'ssarem@mpowercom.com'
Subject: Billing Disputes

Scott-

Our folk continue to analyze the data provided by Mpower to understand what gaps may still exist. I was informed yesterday that it might be the end of the week before we finalize our analysis. Given the time frame to wrap this up coupled with my pending vacation which will start tomorrow, I suggest we wait until my return from vacation before we get back together and see what it will take to close these disputes. I return to the office on July 17th and given I will be unable to do e-mail while out, I would like to shoot for July 21st to reconvene. If this presents a problem with Mpower, please let me know and I will delegate Paul to work with you in my absence.

LBC

EXHIBIT 2

Buntrock, Ross A.

From: Sarem, Scott [ssarem@mpowercom.com]
Sent: Tuesday, September 23, 2003 1:41 PM
To: Buntrock, Ross A
Cc: Sarem, Scott, Wilson, Pat, Heatter, Rick
Subject: FW: TT Disputes

-----Original Message-----

From: COOPER, LARRY B (SBC-MSI) [mailto:lc7178@sbc.com]
Sent: Tuesday, June 17, 2003 6:48 AM
To: 'Sarem, Scott'
Subject: RE: TT Disputes

Scott-

Routinely, the Account Manager and Director work customer issues and most cases are able to get resolutions without further escalation. I don't know if Mpower's issues of late are so far out of the routine and more complex, or meeting of the minds is not as quick to happen because of the issues we ultimately ended up filing formal complaints and thus residue from that process. Whatever the case, I want us to get back to the level we had before. I will personally get involved to find out what's the problem and see if we can get a fix. Was out of the office yesterday, so I will touch bases with my team, find out where we are and give you a follow-up by COB today.

LBC

-----Original Message-----

From: Sarem, Scott [mailto:ssarem@mpowercom.com]
Sent: Monday, June 16, 2003 4:14 PM
To: COOPER, LARRY B (SBC-MSI), O'SULLIVAN, PAUL A (PTSS)
Cc: KERR, DAVID D (SBC-MSI), Wilson, Pat, Heatter, Rick
Subject: FW: TT Disputes
Importance: High

Larry

Attached is the most recent random look at the trouble ticket information. SBC claims is correct that Mpower researched and then contends that SBC is incorrect.

I wanted to provide you this for review. At the rate we are going, the trip charges dispute in all three SBC regions will never be resolved absent legal action. I have been trying to get some resolution with Paul but it seems that his hands are tied.

Please let me know how you would like to proceed on the trip charge issue. Mpower continues to find serious flaws in the tickets we are billed for. We are comfortable with defending ourselves in a collection arbitration. We would rather not go this route, but it seems like it is the route SBC has chosen.

We are now disputing tickets when they are closing in EBTA and this should hopefully help on a prospective basis

I am concerned that it takes months and sometimes over a year to resolve issues. What is missing is the same level of attention Mpower used to receive from SBC. I would like to see that come back. What do we need to do to get back to the good old days?

Regards,

Scott

> -----Original Message-----

> From: Mittwede, Carol

> Sent: Wednesday, June 11, 2003 5:05 PM

> To: Sarem, Scott; Wilson, Pat

> Cc: Reimer, Steve; Scott, Glen; Wetzel, Joe

> Subject: FW: TT Disputes

>

> as requested

>

> -----Original Message-----

> From: Scott, Glen

> Sent: Wednesday, June 11, 2003 4:53 PM

> To: Mittwede, Carol

> Subject: TT Disputes

>

> I left Herman's comments on the PAC Bell accounts but both PAC Bell and

> Ameritech data is attached

>

> -----Original Message-----

> From: Pegues, Herman

> Sent: Wednesday, June 11, 2003 4:46 PM

> To: McGraw, Mike

> Subject: PacBell Disputes.xls

>

>

> They provided us with 30 but some were duplicates. Out of the actual

> 25, 3 of them could not be found at all, so we left them blank. We

> need more proof of why ILEC even rolled on those 3. Out of the 22 left, 12 could be

> disputed which is 54%. <<PacbellDisputes.xls>> <<Ameritech

> Disputes1.xls>>

EXHIBIT 3

Buntrock, Ross A.

From: Sarem, Scott [ssarem@mpowercom.com]
Sent: Tuesday, September 23, 2003 10:43 PM
To: Buntrock, Ross A
Cc: Sarem, Scott
Subject: FW: TT Disputes

-----Original Message-----

From: Sarem, Scott
Sent: Tuesday, July 15, 2003 4:59 PM
To: 'JONES, JENNIFER (PB)'
Subject: RE: TT Disputes

do you or do you not have everything you need?

-----Original Message-----

From: JONES, JENNIFER (PB) [mailto:jd2725@sbc.com]
Sent: Tuesday, July 15, 2003 4:39 PM
To: 'Sarem, Scott'
Subject: RE: TT Disputes

Great! I will confirm that with our billing organization

Jennifer Jones
Account Manager
Industry Markets
SBC/Pacific Bell
415-542-1997 Voice
415-541-0448 Fax
jd2725@sbc.com

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-----Original Message-----

From: Sarem, Scott [mailto:ssarem@mpowercom.com]
Sent: Tuesday, July 15, 2003 4:28 PM
To: JONES, JENNIFER (PB), Sarem, Scott; O'SULLIVAN, PAUL A (PTSS)
Cc: Wilson, Pat, Eichler, Todd
Subject: RE: TT Disputes

So for now you have everything you need?

-----Original Message-----

From: JONES, JENNIFER (PB) [mailto:jd2725@sbccom]
Sent: Tuesday, July 15, 2003 4:26 PM
To: 'Sarem, Scott', O'SULLIVAN, PAUL A (PTSS)
Cc: Wilson, Pat, Eichler, Todd
Subject: RE: TT Disputes

Scott,

In response to your message, it appeared your initial response did not include all the circuits that were associated with our sampling. The LSC will be reviewing your response tomorrow. Upon completion of their review I will let you know if we need additional information.

Thanks,
Jennifer Jones
Account Manager
Industry Markets
SBC/Pacific Bell
415-542-1997 Voice
415-541-0448 Fax
jd2725@sbccom

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-----Original Message-----

From: Sarem, Scott [mailto:ssarem@mpowercom.com]
Sent: Tuesday, July 15, 2003 12:22 AM
To: JONES, JENNIFER (PB), Sarem, Scott, O'SULLIVAN, PAUL A (PTSS)
Cc: Wilson, Pat, Eichler, Todd
Subject: RE: TT Disputes

I am not sure what you are looking for?

-----Original Message-----

From: JONES, JENNIFER (PB) [mailto:jd2725@sbccom]
Sent: Wednesday, July 02, 2003 12:00 PM
To: 'Sarem, Scott', O'SULLIVAN, PAUL A (PTSS)
Cc: Wilson, Pat, Eichler, Todd
Subject: RE: TT Disputes

Scott,

Thank you for your response. However we are looking for approximately 13 more responses for the Ameritech region. Can you advise as to when SBC will receive the remaining tickets?

Thanks,

Jennifer Jones
Account Manager
Industry Markets
SBC/Pacific Bell
415-542-1997 Voice
415-541-0448 Fax
jd2725@sbc.com

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-----Original Message-----

From: Sarem, Scott [mailto:ssarem@mpower.com]
Sent: Wednesday, July 02, 2003 12:05 AM
To: O'SULLIVAN, PAUL A (PTSS), JONES, JENNIFER (PB)
Cc: Wilson, Pat, Eichler, Todd
Subject: FW: TT Disputes

Paul

Attached is Mpower's analysis of the AIT and PB trouble tickets initially researched by SBC

Let me know if you have any questions

Scott

> <<PacbellDisputes.xls>> <<Ameritech Disputes1.xls>>

EXHIBIT 4

Buntrock, Ross A.

From: Sarem, Scott [ssarem@mpowercom.com]
Sent: Monday, September 15, 2003 10:53 AM
To: Buntrock, Ross A
Subject: FW: Ground Rules

Importance: High

-----Original Message-----

From: Sarem, Scott
Sent: Thursday, September 04, 2003 1:54 PM
To: Heatter, Rick; Wilson, Pat; Sarem, Scott
Subject: FW: Ground Rules
Importance: High

Please save this as evidence of the trip charge dispute agreement.

Scott

-----Original Message-----

From: O'SULLIVAN, PAUL A (PTSS) [mailto:po2652@sbc.com]
Sent: Thursday, August 21, 2003 2:36 PM
To: 'Sarem, Scott'
Cc: JONES, JENNIFER (PB); COOPER, LARRY B (SBC-MSI)
Subject: RE: Ground Rules

Scott,

I concur with your upgrades.

Paul O'Sullivan
Director - CLEC Account Management
Industry Markets
415-545-0967 office
877-318-9592 pager
415-541-0665 fax

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-----Original Message-----

From: Sarem, Scott [mailto:ssarem@mpowercom.com]
Sent: Thursday, August 21, 2003 2:21 PM
To: O'SULLIVAN, PAUL A (PTSS); Sarem, Scott
Cc: JONES, JENNIFER (PB); COOPER, LARRY B (SBC-MSI)

Subject: RE. Ground Rules

I propose the following for the bullet point regarding Mpower not being able to find the ticket.

If Mpower cannot find a circuit id associated with the trouble ticket, then SBC must provide information that demonstrates that the circuit id belongs to Mpower. Once SBC can demonstrate the circuit id belongs to MPower it must provide evidence that the trouble was on Mpower's side of the network. If SBC provides conclusive evidence that the circuit belongs to Mpower and that the trouble is on Mpower's side, the ticket will go in SBC's favor.

If trouble is shown to be conclusively on the Mpower side of the network, the ticket will go in SBC's favor.

If trouble is conclusively shown to be on AIT's network, the ticket will go in Mpower's favor.

If you agree to this change we have consensus

Scott

-----Original Message-----

From: O'SULLIVAN, PAUL A (PTSS) [mailto:po2652@sbccom.com]

Sent: Thursday, August 21, 2003 2:12 PM

To: 'Sarem, Scott'

Cc: JONES, JENNIFER (PB); COOPER, LARRY B (SBC-MSI)

Subject: FW: Ground Rules

Scott,

I've made the upgrades that we just discussed to bullet 5 and 7. Let me know if you agree.

Paul O'Sullivan

Director - CLEC Account Management

Industry Markets

415-545-0967 office

877-318-9592 pager

415-541-0665 fax

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> -----Original Message-----

> From: O'SULLIVAN, PAUL A (PTSS)

> Sent: Wednesday, August 20, 2003 3:14 PM

> To: 'Sarem, Scott'

> Cc: JONES, JENNIFER (PB); COOPER, LARRY B (SBC-MSI)

> Subject: Ground Rules

>

> Scott,

>

> Please let me know your thoughts on these ground rules for conducting

> the review of the Mid-west Trip Charges.

>

- > • Sample size is 75 tickets
- > * MPower will provide SBC with 75 numbers, ranging between 2 - 684.
- > Those numbers will correlate to the line item (Trip Ticket dispute) on
- > the master dispute spreadsheet that SBC has compiled Those 75 line
- > items represent the sample that both companies will review.
- > • The results from the 75 tickets will be applied across the entire
- > based to resolve the Mid-West Trip Charge dispute.
- > * If SBC can not find the information on a ticket that supports their
- > position, the ticket will go in MPower's favor.
- > • If MPower can not find the information on a ticket that supports
- > their position, SBC will valid that the circuit belongs to MPower. If
- > MPower still can not find any information the ticket will go in SBC's
- > favor IF SBC finds that the circiut does not belong to MPower that
- > ticket will go in MPower's favor.
- > • If both parties disagree on the findings, then those tickets in
- > question would go through the ADR process for resolution.
- > • Both parties agree to have their research complete within 5
- > business days of receiving the data.

>

> Paul O'Sullivan

> Director - CLEC Account Management

> Industry Markets

> 415-545-0967 office

> 877-318-9592 pager

> 415-541-0665 fax

>

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